Supreme Court, U.S.
FILED
DEC 14 1992
OFFICE OF THE CLERK

92-1013

No. _____

In The

Supreme Court of the United States

October Term, 1992

ADAM FREDERICK CHAPMAN,

Petitioner,

vs.

POWERMATIC, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES W. MCGARRY
Counsel of Record

LAW OFFICE OF CHARLES MCGARRY
714 Jackson Street
Suite 200
Dallas, Texas 75202
(214) 748-0800

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Does 28 U.S.C. § 1446(b) require removal to federal court within 30 days of receiving the plaintiff's state court petition, where the petition shows complete diversity of parties and demands recovery of medical expenses and other damages for serious and permanent personal injuries, and where the defendant has previously obtained from the plaintiff copies of his medical bills in excess of $50,000.00?

2. Is the case stated by the initial pleading in state court "not removable" under 28 U.S.C. § 1446(b) merely because state law prohibits the plaintiff from stating the amount of damages in that petition?

3. Should a plaintiff in state court be required to specifically plead the "federal jurisdictional amount" in his state court petition before commencing the 30 day deadline for removal?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Jurisdiction 2

Statutory Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 4

I. THIS CASE WILL SERVE AS A NATIONAL PRECEDENT 4

II. THE FIFTH CIRCUIT OPINION IS CONTRARY TO THE PLAIN LANGUAGE OF SECTION 1446(b) AND TO THE POLICIES UNDERLYING REMOVAL JURISDICTION ... 5

III. THE EXTENDED REMOVAL PERIOD DOES NOT APPLY IN THIS CASE 8

IV. BOTH THE DEFENDANT AND THE DISTRICT COURT SHOULD HAVE A DUTY TO DETERMINE THE REMOVABILITY OF CASES WITH INDETERMINATE PLEADINGS 11

V. THE POLICY CONSIDERATIONS CITED BY THE FIFTH CIRCUIT ARE SATISFIED BY THE PETITIONER'S PROPOSED RULE 13

VI. THE FIFTH CIRCUIT OPINION IS CONTRARY TO THE POLICY OF RESTRICTING REMOVAL JURISDICTION 15

TABLE OF CONTENTS – Continued

Page

VII. THIS COURT MUST ANNOUNCE A NEW "BRIGHT LINE" RULE FOR DETERMINING THE TIMELINESS OF REMOVAL IN DIVERSITY CASES 17

Conclusion 18

APPENDICES:

Appendix A: *Chapman v. Powermatic*, 969 F.2d 160 (5th Cir. August 26, 1992)..... A-1

Appendix B: Order of United States Court of Appeals denying Petition for Rehearing and Suggestion for Rehearing en Banc (September 21, 1992)..... A-13

TABLE OF AUTHORITIES

Page

CASES

Auto Insurance Agency, Inc. v. Interstate Agency, Inc., 525 F.Supp. 1104 (D.S.C. 1981) 6

B. Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981) 7

Baker v. Firestone Tire & Rubber Co., 537 F.Supp. 244 (S.D. Fla. 1982) 13

Balestrieri v. Bell Asbestos Mines Ltd., 544 F.Supp. 528 (E.D. Pa. 1982) 16

Boland v. Bank Sepah-Iran, 614 F.Supp. 1166 (S.D.N.Y. 1985) 6, 16

Central Iowa Agri-Systems v. Old Heritage Advertising and Publishers, Inc., 727 F.Supp. 1304 (S.D. Iowa 1989) 12

Chapman v. Powermatic, Inc., 969 F.2d 160 (5th Cir. 1992) 1, 9, 13

Cole v. Great Atlantic & Pacific Tea Co., 728 F.Supp. 1305 (E.D. Ky. 1990) 11

Estevez-Gonzales v. Kraft, Inc., 606 F.Supp. 127 (S.D. Fla. 1985) 12

Gaitor v. Peninsular & Occidental Steamship Company, 287 F.2d 252 (5th Cir. 1961) 5, 9

Getty Oil Corp. v. Insurance Co. of North America, 841 F.2d 1254 (5th Cir. 1988) 16

Horak v. Color Metal of Zurich, Switzerland, 285 F.Supp. 603 (D. N. J. 1968) 12

Indian Country USA, Inc. v. Oklahoma, 829 F.2d 967 (10th Cir. 1987) 5

TABLE OF AUTHORITIES – Continued

Page

In re La Providencia Development Corp., 406 F.2d 251 (1st Cir. 1969) 7

International Equity Corporation v. Pepper and Tanner, Inc., 323 F.Supp. 1107 (E.D. Pa. 1971) 6, 15

Kaneshiro v. North American Co. for Life and Health Insurance, 496 F.Supp. 452 (D. Haw. 1980)... 8, 11, 12

Keller v. Carr, 534 F.Supp. 100 (W. D. Ark. 1981) 12

Lee v. Volkswagen of America, Inc., 429 F.Supp. 5 (W.D. Ok. 1976) 6

Lee v. Altamil Corp, 457 F.Supp. 979 (M.D. Fla. 1978)..... 12

Lewis v. Charles H. Bentz Assoc. Inc., 601 F.Supp. 109 (E.D. Wis. 1985)..... 11

McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936)..... 11

Mielke v. Allstate Insurance Co., 702 F.Supp. 1466 (C.D. Cal. 1989) 6, 12, 13, 14, 16

Powers v. Chesapeake & Ohio Ry, 169 U.S. 92 (1898) 7

Pullman Co. v. Jenkins, 305 U.S. 534 (1939)..... 7

Richman v. Zimmer, Inc., 644 F.Supp. 540 (S. D. Fla. 1986)..... 12

Robinson v. Quality Insurance Co., 633 F.Supp. 572 (S.D. Ala. 1986) 7, 9, 11, 12, 14

Ross v. Barrett Centrifugals, 580 F.Supp. 1510 (D. Me. 1984) 6

Royal v. State Farm Fire & Cas. Co., 685 F.2d 124 (5th Cir. 1982)..... 7

TABLE OF AUTHORITIES – Continued

Page

Saidibar v. Heiland Research Corporation, 32 F.Supp. 248 (S.D. Tex. 1940) 7

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941) 6, 16

Turner v Wilson Food Corp., 711 F.Supp. 624 (N.D. Ga. 1989) 12

Weaver v. Miller Elec. Mfg. Co. Inc., 616 F.Supp. 683 (D. Ala. 1985) 6

Ysleta v. Canada, 67 F. 6 (C.C. Tex. 1895) 9

OTHER AUTHORITIES

28 U.S.C. § 1254 2

28 U.S.C. § 1446(b) ..... *passim*

28 U.S.C. § 1447(d) 5

28 U.S.C. § 2101(c) 2

Pub. L. 100-702, § 1016, 102 Stat. 4669 (1988) 16

Siler, *A Calculated Risk: Removal of the Indeterminate Complaint*, Ky Bench & Bar (Wint. 1990) 8, 11

Sup. Ct. R. 13.4 2

Tex. R. Civ. P. 47(b) 8, 10

14A Wright, Miller, and Cooper, Federal Practice and Procedure, § 3732 (2d. ed) 6, 7, 15

No. _____

In The

Supreme Court of the United States

October Term, 1992

ADAM FREDERICK CHAPMAN,

Petitioner,

vs.

POWERMATIC, INC.,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

This petition seeks review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of the United States District Court for the Northern District of Texas. *Chapman v. Powermatic, Inc.*, 969 F.2d 160 (5th Cir. 1992). The petitioner had contended in the district court that the defendant's removal of the case from state court was untimely, having been done more than 30 days after the defendant's receipt of the state court petition. The district court denied petitioner's motion to remand the case back to state court, and proceeded to enter judgment against petitioner after a jury trial.

JURISDICTION

This court has jurisdiction to review the opinion and judgment of the court of appeals pursuant to 28 U.S.C. § 1254.

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were issued on August 26, 1992. Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied by order of the court of appeals dated September 21, 1992. This petition is filed within 90 days of that date as required by 28 U.S.C. § 2101(c). Sup. Ct. R. 13.4.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1446(b) reads:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become

> removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than one year after commencement of the action.

STATEMENT OF THE CASE

This is a personal injury action against the manufacturer of certain woodworking equipment.

At the time of his injury, the plaintiff Adam Frederick Chapman was a 17 year old senior at Duncanville High School in Duncanville, Texas. On October 27, 1989, Adam was severely injured when four fingers of his right hand came into contact with a wood planer in the woodworking shop at the high school.

On March 27, 1990, Adam's trial counsel sent written notice of Adam's claim to Houdaille Industries, Inc., Powermatic-Houdaille, Inc. and Ervin Layne Company, Inc., the manufacturer and distributor of the wood planer. The letter advised each of the potential defendants that Adam had already incurred medical expenses of $67,196.48, and that he had suffered other extensive damages as well.

In April 1990, Powermatic retained Robert Nemesek of Countywide Services Corporation to investigate Adam's claim. Mr. Nemesek was given copies of Adam's medical bills, and an opportunity to interview Adam on April 25, 1990. Mr. Nemesek took photographs of Adam's injuries and of the planer involved. He was also given copies of witness statements, a narrative report by Adam's surgeon, and Adam's employment records.

A lawsuit was filed in the 14th District Court of Dallas County, Texas, on June 28, 1990, approximately three weeks after Mr. Nemesek had been given full documentation of Adam's claim. Powermatic, Inc. filed an answer in state court on July 26, 1990. On August 27, 1990, 48 days after receipt of the petition, Powermatic filed a notice of removal to federal district court.

On September 21, 1990, a motion was filed to remand the case back to state court, contending that the notice of removal was untimely. Powermatic responded that because the plaintiff's petition did not specify an amount of damages, it was entitled to wait until answers to interrogatories confirmed that more than $50,000.00 was in controversy. The district court denied the motion to remand, and also denied a motion to reconsider remanding the case to state court.

The case proceeded to trial before a jury, which found the defendant negligent, but failed to find that such negligence was a proximate cause of plaintiff's injuries. The district court thereupon entered judgment that plaintiff take nothing.

REASONS FOR GRANTING THE WRIT

I. THIS CASE WILL SERVE AS A NATIONAL PRECEDENT.

This case presents an important question of first impression regarding the deadline for removal of diversity cases under 28 U.S.C. § 1446(b).

It is extremely rare for an appellate court to have the opportunity to address important questions of removal jurisdiction.

In many instances, appellate review of removal issues is precluded by a district court order remanding the case to state court. 28 U.S.C. § 1447(d). Only when the plaintiff's motion to remand is denied, and the plaintiff subsequently loses at trial, is an appellate court able to address removal issues. *See, Gaitor v. Peninsular & Occidental Steamship Co.*, 287 F.2d 252 (5th Cir. 1961); *Indian Country USA, Inc. v. Oklahoma*, 829 F.2d 967 (10th Cir. 1987). Although Section 1446(b) has been in effect for well over 40 years, no court of appeals had previously addressed the basic issue of timeliness raised in this appeal, and the district courts have been sharply divided. Consequently, unless this petition is granted, the opinion of the Fifth Circuit is likely to serve as the national precedent for quite some time.

II. THE FIFTH CIRCUIT OPINION IS CONTRARY TO THE PLAIN LANGUAGE OF SECTION 1446(b) AND TO THE POLICIES UNDERLYING REMOVAL JURISDICTION.

The Fifth Circuit opinion in this case adopts a new "bright line rule" regarding the time for removal of diversity cases to federal court. The rule announced by the panel effectively abolishes the 30 day deadline for removal set forth in 28 U.S.C. § 1446(b), and grants defendants in such cases up to one year to seek removal, unless the plaintiff specifically pleads the "federal jurisdictional

amount" in his original state court petition. This is contrary to both state law and prior federal precedent. The effective result is also contrary to the plain language of the removal statute and the policies restricting removal jurisdiction.

A. The Removal Statute Must Be Construed to Limit Federal Jurisdiction.

The removal statute specifies three potential starting points for the thirty day removal period: (1) receipt of the initial pleading; (2) service of summons; or (3) receipt of an amended pleading, motion order or other paper. Importantly, Congress designed the statute so that the method producing the **earliest** termination of the removal period must be used. *International Equity Corporation v. Pepper and Tanner, Inc.*, 323 F.Supp. 1107 (E.D. Pa. 1971); 14A Wright, Miller, and Cooper, *Federal Practice and Procedure*, § 3732, p. 516. (hereinafter, "Wright and Miller"). If there is any question as to which time limit applies, the statute must be construed against federal jurisdiction and in favor of remand. *Weaver v. Miller Elec. Mfg. Co. Inc.*, 616 F.Supp. 683 (D. Ala. 1985); *Boland v. Bank Sepah-Iran*, 614 F.Supp. 1166 (S.D.N.Y. 1985); *Ross v. Barrett Centrifugals*, 580 F.Supp. 1510 (D. Me. 1984). This is consistent with the long-standing general rule that the **entire removal statute should be strictly construed to limit federal jurisdiction.** *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100 (1941). This is especially true in diversity cases. *Mielke v. Allstate Insurance Co.*, 702 F.Supp. 1466 (C.D. Cal. 1989); *Auto Insurance Agency, Inc. v. Interstate Agency, Inc.*, 525 F.Supp. 1104 (D.S.C. 1981); *Lee v. Volkswagen of America, Inc.*, 429

F.Supp. 5 (W.D. Ok. 1976); *Robinson v. Quality Insurance Co.*, 633 F.Supp. 572 (S.D. Ala. 1986); *Saidibar v. Heiland Research Corporation*, 32 F.Supp. 248 (S.D. Tex. 1940); *In re La Providencia Development Corp.*, 406 F.2d 251 (lst Cir. 1969).

B. The Statutory Time Limits For Removal are Mandatory.

The thirty day time limits for removal are mandatory. The court has no discretion but to remand a case that has not been timely removed. *Powers v. Chesapeake & Ohio Ry*, 169 U.S. 92 (1898); *Royal v. State Farm Fire & Cas. Co.*, 685 F.2d 124, 126-7 (5th Cir. 1982); *see also*, Wright and Miller, § 3732.

C. The Defendant Has the Burden of Proving Timeliness.

To avoid the thirty day deadline, Powermatic invoked the second paragraph of section 1446(b) to justify its later removal of the case to federal court. The defendant has the burden of establishing its right to invoke federal jurisdiction under this provision. *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939), *B. Inc. v. Miller Brewing Co.*, 663 F.2d 545 (5th Cir. 1981); *Robinson v. Quality Insurance Co.*, 633 F.Supp. 572 (S.D. Ala. 1986). This requires proof of two elements:

> (1) that the case stated by the initial pleading was "not removable"; and (2) that the notice of removal was filed within thirty days of receipt of some "other paper from which it may

> be first ascertained that the case is . . . removable."

28 U.S.C. § 1446(b). If it is reasonably questionable whether a defendant has satisfied these requirements, the statute should be construed against removal and in favor of remand in this case.

III. THE EXTENDED REMOVAL PERIOD DOES NOT APPLY IN THIS CASE.

A. Cases with Indeterminate Pleadings Are Removable.

The extended removal period applies only when "the case stated by the initial pleading is not removable." 28 U.S.C. § 1446(b). This is not such a case.

All state-filed actions are either: (1) removable; (2) not removable; or (3) indeterminate as to their removability. *Kaneshiro v. North American Co. for Life and Health Insurance*, 496 F.Supp. 452, 457 (D. Haw. 1980); Siler, *A Calculated Risk: Removal of the Indeterminate Complaint*, Ky. Bench & Bar, p. 19 (Wint. 1990). Thus, it is important to distinguish between cases where the initial pleading affirmatively states a case that is not removable, (such as the joinder of a non-diverse party), and those where the initial pleading on its face merely fails to show whether the case is removable.

The facts of this case present an extremely common scenario. The initial pleading showed complete diversity of citizenship among the parties, but pled for an indeterminate amount of damages. Such pleadings are in fact **required** under Texas law. Tex. R. Civ. P. 47(b).

In such cases, the pleading does not show that the case is "not removable"; it simply does not comment on federal jurisdiction. *Robinson v. Quality Insurance Co.*, 633 F.Supp. 572 (S.D. Ala. 1986). This is appropriate, because state court pleadings should not have to be drafted with federal jurisdiction in mind. *Id.* If a case is removable, then it's removable, regardless of whether the pleading shows federal jurisdiction. *Id.*, at 576. The Fifth Circuit had long recognized that cases with indeterminate pleadings could still be removed. *Gaitor v. Peninsular & Occidental Steamship Company*, 287 F.2d 252, 255 (5th Cir. 1961); *Ysleta v. Canada*, 67 F. 6 (C.C. Tex. 1895).

B. The Fifth Circuit Opinion is Contrary to the Plain Language of the Removal Statute.

The Fifth Circuit opinion recognizes that this cause could have been removed immediately, despite the indeterminate pleading. *Chapman v. Powermatic, Inc.*, 969 F.2d 160, 163 (5th Cir. 1992). Nevertheless, it holds that the 30 day deadline for removal is not commenced by the receipt of such a pleading. The court of appeals would require that a state court petition specifically plead the "federal jurisdictional amount" before the deadline begins to run.

This is directly contrary to the plain language of Section 1446(b). The statute says that all cases must be removed within 30 days of receiving the initial pleading, unless the case is "not removable." Since this case *was* removable, the extended removal period could not apply under the plain and unambiguous language of the statute. At best, the statutory phrase "not removable" is

ambiguous, and policy dictates that it be interpreted **not** to include indeterminate pleadings, so as to restrict removal jurisdiction by making the extended removal period unavailable in such cases. *See* pp. 16-17, *infra*.

The Fifth Circuit opinion erroneously reverses both the statutory scheme and the burden of proof. The statute requires removal of all cases within 30 days of receiving the petition. The statute also gives the defendant the burden of showing that the case was "not removable" before he gets an extension of time. In contrast, the Fifth Circuit opinion presumes that the extended removal period applies in all diversity cases, unless the plaintiff carries the burden of affirmatively pleading that the case is removable.

C. The Fifth Circuit Opinion is Contrary to Texas Law.

The Fifth Circuit opinion would effectively abolish the 30 day removal deadline in all diversity cases, because indeterminate pleadings are required under Texas law. To avoid a result that is so obviously contrary to the language and spirit of the removal statute, the court of appeals requires state court plaintiffs to plead for damages "in excess of the federal jurisdictional amount." However, this is contrary to Texas law and to the law in many other states.

Texas Rule of Civil Procedure 47(b) states that "an original pleading . . . shall contain . . . only the statement that the damages sought are within the jurisdictional limits of the court . . . "

This clear and unambiguous language is not merely a prohibition against pleading for a specific amount of damages; it is an affirmative requirement specifying the "only" statement which "shall" be made. The Rule prohibits any other statement, including any statement that damages exceed the federal jurisdictional amount.

Even if Rule 47(b) did not specify so clearly what is required, it is unrealistic in the extreme to expect plaintiffs who have consciously chosen a state court forum to plead federal jurisdiction in state court. State court pleadings should not have to be drafted with federal jurisdiction in mind. *Robinson v. Quality Insurance Co.*, 633 F.Supp. 572 (S.D. Ala. 1986). The effective result, again, is to abolish the 30 day removal deadline in all diversity cases.

IV. BOTH THE DEFENDANT AND THE DISTRICT COURT SHOULD HAVE A DUTY TO DETERMINE THE REMOVABILITY OF CASES WITH INDETERMINATE PLEADINGS.

Given the distinction between non-removable and merely indeterminate cases, the prevailing school of thought imposes upon a district court the duty of determining whether a case having indeterminate pleadings was properly removed. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936); *Robinson v. Quality Insurance Co.*, 633 F.Supp. 575; *Cole v. Great Atlantic & Pacific Tea Co.*, 728 F.Supp. 1305 (E.D. Ky 1990) (and cases cited therein); *Lewis v. Charles H. Bentz Assoc. Inc.*, 601 F.Supp. 109 (E.D. Wis. 1985); *Kaneshiro v. North American Co. for*

Life & Health Ins., 496 F.Supp. 452 (D. Haw. 1980); Siler, *supra*, Kentucky Bench & Bar p. 19 (Wint. 1990).

Given the court's responsibility, the defendant's burden of proof, and the Congressional policy of requiring the earliest possible removal, the prevailing authorities also impose upon the defendant the duty of exercising due diligence to determine removability when the initial pleading is indeterminate. *Central Iowa Agri-Systems v. Old Heritage Advertising and Publishers, Inc.*, 727 F.Supp. 1304 (S.D. Iowa 1989); *Turner v Wilson Food Corp.*, 711 F.Supp. 624 (N.D. Ga. 1989); *Richman v. Zimmer, Inc.*, 644 F.Supp. 540 (S.D. Fla. 1986); *Robinson v. Quality Insurance Co.*, 633 F.Supp. 572, 576 (S.D. Ala. 1986).

Since an indeterminate pleading imposes on the defendant a duty to use due diligence in determining removability, the plain language of section 1446(b) precludes giving the defendant an extension of time in which to seek removal unless the case is in fact "not removable." The defendant should not be permitted to delay removal of a diversity case, knowing full well that the requisite amount is in controversy, simply because he does not seek the plaintiff's formal admission of the amount in controversy. This is precisely the holding of a well-reasoned line of cases, best exemplified by *Mielke v. Allstate Insurance Co*, 472 F.Supp. 851 (E.D. Mich. 1979); *see also, Lee v. Altamil Corp*, 457 F.Supp. 979 (M.D. Fla. 1978); *Horak v. Color Metal of Zurich, Switzerland*, 285 F.Supp. 603 (D. N. J. 1968); ; *Keller v. Carr*, 534 F.Supp. 100 (W. D. Ark. 1981); *Richman v. Zimmer, Inc.*, 644 F.Supp. 540 (S. D. Fla. 1986); *Kaneshiro v. North American Company for Life and Health Insurance*, 496 F.Supp. 452 (D. Haw. 1980); *Turner v Wilson Food Corp.*, 711 F.Supp. 624 (N.D. Ga. 1989); *Estevez-*

Gonzales v. Kraft, Inc., 606 F.Supp. 127 (S.D. Fla. 1985); *Baker v. Firestone Tire & Rubber Co.*, 537 F.Supp. 244 (S.D. Fla. 1982).

V. THE POLICY CONSIDERATIONS CITED BY THE FIFTH CIRCUIT ARE SATISFIED BY THE PETITIONER'S PROPOSED RULE.

The proposed rule advanced by petitioner and exemplified by the *Mielke* case was rejected in the Fifth Circuit without citation to any contrary authority, either primary or secondary. However, the court of appeals does cite two policy concerns: (1) that defendants would be uncertain as to removability of cases with indeterminate damages, and would be encouraged to "prematurely" remove cases; and (2) that courts would be uncertain as to the timeliness of removal, and would be forced to have a hearing on whether the defendant should have known that the case was removable. *Chapman*, 969 F.2d at 163.

These concerns are adequately addressed by the *Mielke* line of reasoning. As that case clearly states:

> The only extension allowed by § 1446(b) is for cases where removability cannot be ascertained until the defendant receives subsequent information from the plaintiff. Some courts construe this to mean that the elements of removability must be specifically indicated in official papers before the statutory period begins to run. [citation omitted]. These cases suggest a policy that does not require a defendant to speculate about jurisdictional elements on pain of losing his right to remove. However, in diversity cases that can best be handled in state court, there is no

> reason to allow a defendant additional time if the presence of grounds for removal are **unambiguous** in light of the defendant's knowledge and the claims made in the initial complaint. To permit removal in this case would circumvent the purpose of § 1446(b) which is to limit the time for removal except where the defendant cannot be sure that the case is removable.

Mielke v. Allstate Ins. Co., 472 F.Supp. at 853 (emphasis added).

And as another court has observed in weighing these competing policies:

> When a defendant need not exercise such diligence, the purpose of section 1446 (b) is thwarted, as the defendant can have it both ways. He can know the case is removable, and yet wait until removal is convenient. This results in unnecessary and wasteful conflicts between the state and federal systems. Note that the defendant will not be held accountable for the thirty days when the complaint contains no **clue** of its removability.

Robinson v. Quality Ins. Co., 633 F.Supp. at 576, n. 3.

No uncertainty of any kind is generated if a defendant's duty of due diligence is narrowly defined to mean that he must remove within 30 days of receiving the initial petition only if he has documentary or other unambiguous evidence of federal jurisdiction. In such cases, the case would be promptly removed, and the plaintiff would have no grounds to seek a remand. More importantly, timeliness would no longer be a contested issue, because requiring removal within 30 days of receiving the

initial pleading is a much clearer "bright line rule" than the one announced by the Fifth Circuit.

The defendant in this case, Powermatic, knew for certain that this case was removable even before suit was filed. It knew the plaintiff's citizenship, its own citizenship, and it knew that the plaintiff's past medical bills alone exceeded $67,000.00. No purpose would be served by allowing such defendants additional time to remove beyond the initial thirty day period. Moreover, the Fifth Circuit's interpretation of section 1446(b) would allow defendants to manipulate the removal period for up to a year by intentionally delaying discovery on the amount of damages. Defendants should not be allowed to have it both ways. The statute should be construed so that the defendant is required to remove a case within thirty days of receiving the complaint.

VI. THE FIFTH CIRCUIT OPINION IS CONTRARY TO THE POLICY OF RESTRICTING REMOVAL JURISDICTION.

The policy which is emphasized first and foremost throughout the removal statute is to require the earliest possible removal by the defendant. *International Equity Corp. v. Pepper and Tanner, Inc.*, 323 F.Supp. 1107, 1109 (E.D. Pa. 1971); Wright and Miller, § 3732, p. 516. This policy is reflected in the language of the statute, which starts the thirty day period with receipt of the initial pleading or service of summons, "whichever period is shorter," and which permits an extension only if the initial case is "not removable." 28 U.S.C. § 1446(b). The policy is also reflected in the 1988 amendment to the

statute, which further restricted even the extended removal period to a maximum of one year. Pub. L. 100-702, § 1016, 102 Stat. 4669 (1988). Such an amendment would not make sense unless the defendant is to be under a duty to use due diligence in ascertaining removability.

The policy of requiring the earliest possible removal is also reflected in another line of cases actually adopted by the Fifth Circuit. In cases involving multiple defendants, the initial thirty day removal period is measured from the date on which the **first** defendant receives the initial pleading. *Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254 (5th Cir. 1988); *see also, Balestrieri v. Bell Asbestos Mines Ltd.*, 544 F.Supp. 528 (E.D. Pa. 1982). The effect of this is to allow subsequently served defendants less than thirty days if they wish to seek removal. Nothing in the statute would seem to require this result, except for the expressed Congressional policy of limiting the time for removal.

The second public policy served by the *Mielke* line of cases, which is related to the policy of requiring the earliest possible removal period, is the policy of construing the removal statute to limit federal jurisdiction. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941); *Boland v. Bank Sepah-Iran*, 614 F.Supp. 1166 (S.D.N.Y. 1985). This policy is reflective of the notion that removal is a limited statutory right.

The Fifth Circuit opinion is completely antagonistic to these well-established policies. Although it cites "judicial efficiency" as its goal, the Fifth Circuit opinion would allow defendants to delay removal of any diversity case for up to a full year, by simply not asking the plaintiff to

specify his damages. This is a tremendous waste of both state and federal judicial resources. Federal courts will find themselves further inundated with diversity cases that have already been partially litigated under the various state rules of procedure. The initial 30 day removal period is mandatory precisely to limit such cases.

VII. THIS COURT MUST ANNOUNCE A NEW "BRIGHT LINE" RULE FOR DETERMINING THE TIMELINESS OF REMOVAL IN DIVERSITY CASES.

The best rule for determining the timeliness of removal is relatively simple to discern from the plain language of section 1446(b). The general rule is that removal must be sought within thirty days of receiving the initial pleading. 28 U.S.C. § 1446(b). The sole exception to this rule, according to the plain language of the statute, is when the case stated by initial pleading is "not removable."

In a diversity case where the pleading seeks an indeterminate amount of damages, the stated case is "not removable," as a practical matter, only if the defendant is unable to intelligently ascertain that the case is removable. If, at or before the time the defendant receives the initial pleading, a defendant has also received documentation from which it can conclusively ascertain that the case is removable, then the defendant must seek removal within thirty days of receiving the initial pleading, pursuant to the first paragraph of section 1446(b).

Such a rule is internally coherent, consistent with the express language of section 1446(b), and supportive of the policy requiring the earliest possible removal. Petitioner urges its adoption by the Court.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Honorable Court grant the instant Petition for Writ of Certiorari and, upon review, reverse the decisions of the United States Court of Appeals and the district court, and remand this case to the district court with instructions to remand this action back to state court.

Respectfully submitted,

CHARLES W. MCGARRY
Counsel of Record

LAW OFFICE OF CHARLES MCGARRY

714 Jackson Street
Suite 200
Dallas, Texas 75202
(214) 748-0800

Counsel for Petitioner

Adam Frederick CHAPMAN,
Plaintiff-Appellant,

v.

POWERMATIC, INC., Defendant-Appellee.

No. 91-7164.

United States Court of Appeals,
Fifth Circuit.

Aug. 26, 1992.

Appeal from the United States District Court For the Northern District of Texas.

Before GOLDBERG, JONES, and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

Adam Frederick Chapman (Chapman), a student at Duncanville High School in Duncanville, Texas, was injured when his right hand came into contact with a wood planer in the wood-working shop of the high school. Shortly thereafter, on March 27, 1990, Chapman's attorney sent a letter to Powermatic, Inc., (Powermatic), the manufacturer of the wood planer, advising Powermatic that it was a potential defendant and that Chapman had incurred medical expenses in the amount of $67,196.48. Additionally, in April 1990, Chapman provided the investigative service hired by Powermatic with copies of Chapman's medical bills.[1]

---

[1] Before Chapman sued Powermatic the investigative service interviewed Chapman, took photographs of his injuries, obtained a copy of a report from his surgeon describing his injuries, and obtained copies of witnesses' statements.

On June 28, 1990, Chapman sued Powermatic in state court alleging numerous causes of action.[2] The petition was served on Powermatic on July 10, and Powermatic filed its answer on July 26. The petition revealed that there was complete diversity of citizenship between the two parties, but it did not plead for a specific amount of damages. On August 17, 1990, Chapman answered the first set of interrogatories that Powermatic had served on him in which Chapman stated that he had suffered damages in excess of $800,000. On August 27, Powermatic filed a notice of removal in the United States District Court for the Northern District of Texas (the "USDC). In response, Chapman moved to have the case remanded to state court contending that Powermatic did not timely remove the case. The USDC denied Chapman's motion to remand holding that the "[d]efendant removed this case within 30 days from the time it received answers to interrogatories stating that the amount in controversy was over $50,000. This case was timely removed pursuant to 28 U.S.C. § 1446(b)." The case proceeded to trial before a jury; and at the conclusion of the trial, the jury found that Powermatic did not cause Chapman's injuries. The USDC entered a take nothing judgment on the jury's verdict. Chapman appeals the USDC's denial of his motion to remand.

DISCUSSION

Both parties agree that the requirements for diversity jurisdiction exist in this case: the "matter in controversy

---

[2] Chapman sued Powermatic under the theories of negligence, strict liability, breach of warranty, and the Deceptive Trade Practices Act.

exceeds the sum or value of $50,000," and the parties are "citizens of different states." 28 U.S.C. § 1332(a). What the parties do not agree on, however, and what Chapman's appeal concerns, is whether Powermatic timely removed the case to federal court pursuant to 28 U.S.C. § 1446(b). Section 1446(b) provides in pertinent part that:

> [the] notice of removal of a civil action of proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based. . . .
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable. . . .

In essence, when read as a whole, § 1446(b) provides a two-step test for determining whether a defendant timely removed a case. The first paragraph provides that if the case stated by the initial pleading is removable, then notice of removal must be filed within thirty days from the receipt of the initial pleading by the defendant; and the second paragraph provides, if the case stated by the initial pleading is not removable, then notice of removal must be filed within thirty days from the receipt of an amended pleading, motion, order, or other paper from which the defendant can ascertain that the case is removable.

A. Initial Pleading

Relying on the first paragraph of § 1446(b), Chapman contends that the district court erred in not remanding the case to state court because Powermatic did not remove the case within thirty days from its receipt of the initial pleading. To support his contention that the district court erred Chapman argues that all pleadings fall into one of three categories: (1) removable, (2) nonremovable, and (3) indeterminate as to removability. The initial pleading in this case was indeterminate as to removability, Chapman contends, because it revealed that there was complete diversity of citizenship between the parties, but it pled for an indeterminate amount of damages.[3]

---

[3] Chapman's initial petition stated that he had "suffered damages in excess of the minimum jurisdictional limits of the court." A question exists whether there is a minimum jurisdictional limit in Texas district court, which is where the suit was initially fled, although one commentator has opined that the jurisdictional minimum is five hundred dollars. See W. Dorsaneo, 1 Tex.Lit.Guide § 2.01[3][b][ii] (1989); See also *City of Mesquite v. Moore*, 800 S.W.2d 617, 621 n. 1 (Tex.App. – Dallas 1990, no writ).

Texas Rule of Civil Procedure 47(b) states that "an original pleading . . . shall contain (b) in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limits of the court, . . . "; See also La.Code Civ.Proc.Ann. Art. 893(A)(1) ("No specific monetary amount of damages shall be included in the allegations or prayer for relief of any original, amended, or incidental demand. The prayer for relief shall be for such damages as are reasonable in the premises. If a specific amount of damages is necessary to establish the jurisdiction of the court, the right to a jury trial or for other purposes, a general allegation that the claim exceeds or is less than the requisite amount is sufficient.") In our opinion, neither T.R.C.P. 47(b) nor La.Code Civ.Proc.Ann. art. 893(A)(1) prohibit

When a pleading is indeterminate as to removability, Chapman contends, a defendant is under a duty to exercise due diligence in determining whether the case is in fact removable. Applying that duty of due diligence to the facts of the present case, Chapman contends that Powermatic was required under the first paragraph of § 1446(b) to remove the case within 30 days from its receipt of the initial pleading, because the initial pleading revealed that there was complete diversity of citizenship between the parties, and Powermatic knew or in the exercise of due diligence should have known that the amount in controversy exceeded $50,000.[4]

We have found no circuit court opinions that address whether a defendant is under a duty to exercise due diligence in determining the amount in controversy when the initial pleading does not reveal such an amount, and the district court opinions addressing this question are in disagreement.[5] In large part, Chapman bases his contention that Powermatic did not timely remove the case on

---

a plaintiff from alleging in his initial pleading that the damages exceed the minimum jurisdictional amount of the federal court.

[4] Powermatic tacitly concedes that it knew that the amount in controversy exceeded the $50,000 minimum jurisdictional limit of the federal court when it received the initial pleading.

[5] See e.g. *Mielke v. Allstate Insur. Comp.*, 472 F.Supp. 851 (E.D.Mich.1979); *Turner v. Wilson Foods Corp.*, 711 F.Supp. 624, 626 (N.D.Ga.1989) (initial pleading was held to put the defendant on notice that the amount in controversy exceeded $10,000 when the initial pleading alleged severe burns, permanent scarring, pain and suffering, and lifelong medical expenses, but did not specify an amount of damages); *Richman v. Zimmer, Inc.*, 644 F.Supp. 540, 542 (S.D.Fla.1986) (initial pleading that alleged serious personal injuries was held to place the defendant on notice that the case was removable, even though the plaintiff

the district court opinion of *Mielke v. Allstate Insurance Company*, 472 F.Supp. 851 (E.D.Mich.1979). In *Mielke*, the initial pleading of the plaintiff did not contain a specific demand for damages, however, before the defendant had received the initial pleading, the plaintiff had sent the defendant copies of medical bills and expenses that revealed that he was seeking damages in excess of the minimum jurisdictional amount of the federal court. Additionally, the defendant admitted that it had actual knowledge that the plaintiff was seeking damages in excess of the jurisdictional minimum. Forty-five days after receiving the initial pleading, but only thirty days after receiving an amended pleading revealing that the amount in controversy was in excess of five million dollars, the defendant removed the case. After removal, the district court remanded the case to state court holding that removal of the case was untimely because the defendant should have ascertained from the circumstance and the initial pleading that the defendant was seeking damages in excess of the minimum jurisdictional amount. The court stated that "there is no reason to allow a defendant

---

merely alleged that his damages exceeded the state court's minimum jurisdictional amount); *Lee v. Altamil Corp.*, 457 F.Supp. 979, 981 (M.D.Fla.1978) (initial pleading merely alleging that the plaintiff's damages exceeded the state jurisdictional minimum of $2,500 was held to adequately place the defendant on notice of the substantial damages involved); But see contra *Rowe v. Marder*, 750 F.Supp. 718, 721 (W.D.Pa.1990), *aff'd* 935 F.2d 1282 (3rd Cir.1991) (court held that "initial pleading" did not begin the running of the thirty day time period for removal when it did not allege a specific amount of damages, even though the defendant probably knew that the damages would exceed $50,000).

additional time if the presence of grounds for removal are unambiguous in light of the defendant's knowledge and the claims made in the initial complaint." *Id.* at 853.

We disagree with the opinion of the district court in *Mielke,* and conclude that for the purposes of the first paragraph of § 1446(b), the thirty day time period in which a defendant must remove a case starts to run from defendant's receipt of the initial pleading only when that pleading affirmatively reveals on its face that the plaintiff is seeking damages in excess of the minimum jurisdictional amount of the federal court.[6] We adopt this rule because we conclude that it promotes certainty and judicial efficiency by not requiring courts to inquire into what a particular defendant may or may not subjectively know. The rule announced in *Mielke,* which Chapman proposes that we adopt, in contrast, would needlessly inject uncertainty into a court's inquiry as to whether a defendant has timely removed a case, and as a result would require courts to expend needlessly their resources trying to determine what the defendant knew at the time it received the initial pleading and what the defendant

---

[6] Should a defendant choose to remove a case within thirty days from its receipt of an initial pleading that does not reveal on its face that the plaintiff is seeking damages in excess of the jurisdictional minimum, the federal court may either: (1) look to the petition for removal, (2) make an independent appraisal of the amount of the claim, or suggest that the defendant is free to do so, or (3) remand the action. *Rollwitz v. Burlington Northern R.R.,* 507 F.Supp. 582, 585 (D.Mont.1981); *Coleman v. Southern Norfolk,* 734 F.Supp. 719 (E.D.La.1990); See also Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3725 at 423, 426-27.

would have known had it exercised due diligence. Moreover, the rule in *Mielke* would encourage defendants to remove prematurely cases in which the initial pleading does not affirmatively reveal that the amount in controversy is in excess of $50,000 so as to be sure that they do not accidentally waive their right to have the case tried in a federal court. We believe the better policy is to focus the parties' and the court's attention on what the initial pleading sets forth, by adopting a bright line rule requiring the plaintiff, if he wishes the thirty-day time period to run from the defendant's receipt of the initial pleading, to place in the initial pleading a specific allegation that damages are in excess of the federal jurisdictional amount.

B. Other Paper

Chapman's second contention is that even if the initial pleading did not state a case that was removable pursuant to the first paragraph of § 1446(b), Powermatic's removal was still untimely pursuant to the second paragraph of § 1446(b). The medical bills and demand letter delivered by Chapman to Powermatic before it was sued revealing that Chapman was seeking damages in excess of $50,000, Chapman contends, were "other paper" within the meaning of the second paragraph of § 1446(b). Therefore, Chapman contends, Powermatic's receipt of that "other paper" (medical bills and demand letter) before it was sued, revealing that the amount in controversy exceeded $50,000, coupled with Powermatic's receipt of the initial pleading revealing complete diversity of citizenship between the parties, triggered the thirty-day time limit of the second paragraph of

§ 1446(b). In other words, Chapman contends that "other paper" for purposes of the second paragraph of § 1446(b) may come prior to the defendant's receipt of the initial pleading. And if this occurs, Chapman contends, that the thirty-day time period begins to run from the time that the defendant received the initial pleading.

Chapman bases his contention on the opinion of the district court in *Central Iowa Agri-Systems v. Old Heritage Advertisers and Publishers, Inc.*, 727 F.Supp. 1304 (S.D. Iowa 1989). In *Central Iowa*, the plaintiff's initial pleading did not allege a specific amount of damages, but the plaintiff had sent the defendant a demand letter before he sued in which the plaintiff stated that he conservatively estimated his damages to be in excess of $40,000.[7] That pre-suit demand letter, the court held, was an "other paper" for purposes of the second paragraph of § 1446(b) from which the defendant could ascertain that the case was removable. Therefore, the court held that the defendant's removal of the case was untimely because the defendant did not remove within thirty days from its receipt of the initial pleading.

We decline to follow the district court's opinion in *Central Iowa* and consequently reject Chapman's contention, because we conclude that both are in conflict with the plain language of the removal statute. The plain language of the second paragraph of § 1446(b) requires that if an "other paper" is to start the thirty-day time period, a defendant must receive the "other paper" after receiving

---

[7] The minimum jurisdictional limit of the federal court applicable at this time was $10,000.

the initial pleading.[8] The second paragraph of § 1446(b) applies by its terms only "if the case stated by the initial pleading is not removable. . . . " 28 U.S.C. § 1446(b). More important, the second paragraph of § 1446(b) requires that the defendant remove the case, if at all, within 30 days after receipt of an "other paper" from which the defendant may first ascertain that the case is removable. Logic dictates that a defendant can "first" ascertain whether a case is removable from an "other paper" only after receipt of both the initial pleading and that "other paper"; and therefore the thirty-day time period begins to run, not from the receipt of the initial pleading, but rather from the receipt of the "other paper" revealing that the case is removable. Chapman would have us adopt a rule which would be clearly inconsistent with the plain language of the second paragraph of § 1446(b), which states that "a notice of removal may be filed within thirty days after receipt by the defendant . . . [of an] other paper from which it may first be ascertained that the case is one which is or has become removable. . . . " By its plain terms the statute requires that if an "other paper" is to trigger the thirty-day time period of the second paragraph of § 1446(b), the defendant must receive the "other paper" only after it receives the initial pleading. Finally, we believe that our holding that the "other paper" must be received after the filing of the initial pleading is supported by the recitation in the second paragraph of § 1446(b) of the words "amended pleading, motion,

---

[8] We express no opinion as to whether the medical bills and demand letter would otherwise be adequate as "other paper" for purposes of the second paragraph of § 1446(b).

order" before the words "or other paper," which clearly refer to actions normally and logically occurring after the filing of the initial pleading. Clearly the answer to interrogatory which triggered the filing of the notice of removal in this case is such an "other paper."

We find the plain language of the statute to be clear in this regard and as such we are bound to follow it. "[I]n any case requiring statutory construction, the High Court has instructed us to adhere to the plain language of the law unless 'literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' " *In re Meyerland Co.*, 960 F.2d 512, 516 (5th Cir.1992), (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982)). We conclude that adhering to the plain language of the second paragraph of § 1446(b) by requiring that an "other paper," in order to trigger the thirty-day time period, be received by a defendant only after that defendant has received the initial pleading does not "produce a result demonstrably at odds with the intentions of its drafters," but, instead, produces a result that is entirely consistent with the intentions of its drafters. *Id.*

In summation, we hold that Powermatic timely removed this case because: (1) the initial pleading was not removable pursuant to the first paragraph of § 1446(b), since it did not reveal on its face that the amount in controversy was in excess of $50,000; and (2) the medical bills and demand letter received by Powermatic did not begin the running of the thirty-day time period of the second paragraph of § 1446(b), since Powermatic received the medical bills and demand letter before it received the initial pleading.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-7164

ADAM FREDERICK CHAPMAN,

Plaintiff-Appellant,

versus

POWERMATIC, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 08-26-92, 5 Cir., 1992, ___F.2d___)

(September 21, 1992)

Before GOLDBERG, JONES and DeMOSS, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of

said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

Supreme Court, U.S.
FILED
JAN 11 1993
OFFICE OF THE CLERK

No. 92-1013

In The

Supreme Court of the United States

October Term, 1992

ADAM FREDERICK CHAPMAN,

Petitioner,

vs.

POWERMATIC, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARK A. SHANK
WILLIAM L. DAVIS
Counsel of Record

CLARK, WEST, KELLER,
BUTLER & ELLIS
4800 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270-2146
Telephone: (214) 741-1001
Facsimile: (214) 760-9812

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner timely filed his Petition for Writ of Certiorari with this Court.

2. Whether this Court should exercise its power to review the decision of the United States Court of Appeals for the Fifth Circuit.

3. Whether the court of appeals erred in holding that the original pleading in this case which did not state an amount in controversy in excess of $50,000 was not removable.

4. Whether the court of appeals erred in holding that the medical bills and demand letter received by Powermatic did not begin the running of the thirty-day time period for removal since Powermatic received them prior to receiving the initial pleading.

5. Whether this Court should overturn the Fifth Circuit's finding that the case was not removable until Plaintiff served its interrogatory answers stating, for the first time, the amount and nature of damages he was seeking in this case.

6. Whether the district court abused its discretion in finding that Powermatic's Notice of Removal was timely and exercising diversity jurisdiction.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

JURISDICTION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 3

I. THE PETITION FOR WRIT OF CERTIORARI IS UNTIMELY 3

II. THE DISTRICT COURT HAD DIVERSITY JURISDICTION AND THE PLAINTIFF RECEIVED A FULL AND FAIR TRIAL ON THE MERITS 4

III. THE ISSUES PRESENTED IN THIS CASE ARE PROPERLY LEFT TO THE DISCRETION OF THE DISTRICT COURTS 5

IV. THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY INTERPRETED 28 U.S.C. § 1446(b) 6

A. The Case Stated by Plaintiff's Original Petition Was Not Removable 6

B. Plaintiff's Interrogatory Answers Were An "Other Paper" Within the Meaning of § 1446(b) 7

V. MISSTATEMENTS IN THE PETITION FOR WRIT OF CERTIORARI 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Chapman v. Powermatic, 969 F.2d 160 (5th Cir. 1992) . . .7, 9

Financial Timing Publications, Inc. v. Compugraphics Corp., 893 F.2d 936 (8th Cir. 1990) 4, 5

Horton v. Liberty Mutual Ins. Co., 367 U.S. 348, *reh'g denied*, 368 U.S. 870 (1961) 6

Leininger v. Leininger, 705 F.2d 727 (5th Cir. 1983) 4

Mission Pacific Co. v. Fitzgerald, 160 U.S. 556 (1896) 4

Missouri v. Jenkins, 495 U.S. 33 (1980) 3

Pope v. MCI Telecommunications Corp., 937 F.2d 258 (5th Cir. 1991), *cert. denied*, ___ U.S. ___ (1992) 5

Powers v. Chesapeake and Ohio Railroad Co., 169 U.S. 92 (1898) 7

Young v. Kirsch, 814 S.W.2d 77 (Tex. App. – San Antonio 1991, no writ) 8

STATUTES

28 U.S.C. § 1446(b) 2, 4, 5, 6, 7, 9

28 U.S.C. § 2101(c) 2, 3

RULES OF PROCEDURE

Federal Rules of Appellate Procedure, Rule 35 .....1, 3

Federal Rules of Appellate Procedure, Rule 40 1

Sup. Ct. R. 10 4

Sup. Ct. R. 13.4 .....2, 3

Texas Rules of Civil Procedure, Rule 47(b) 8

No. 92-1013

In The

Supreme Court of the United States

October Term, 1992

ADAM FREDERICK CHAPMAN,

Petitioner,

vs.

POWERMATIC, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The Court of Appeals for the Fifth Circuit issued its decision on August 26, 1992. Petitioner filed a Suggestion for Rehearing In Banc under Rule 35(b) of the Federal Rules of Appellate Procedure. Petitioner did not file a petition for rehearing under Rule 40 of the Federal Rules of Appellate Procedure. Petitioner filed the present Petition for Writ of Certiorari more than ninety days after the August 26, 1992 judgment of the Fifth Circuit. The Petition for Writ of Certiorari is therefore untimely and this

Court lacks jurisdiction. 28 U.S.C. § 2101(c). Sup. Ct. R. 13.4.

STATEMENT OF THE CASE

Plaintiff's Original Petition was filed in state court on June 28, 1990, and served on the Secretary of State of Texas on July 10, 1990. Powermatic filed its Original Answer on July 26, 1990. Plaintiff's Original Petition failed to state the amount of damages he was seeking. Powermatic served its first set of interrogatories on Plaintiff on August 3, 1990, requesting, among other things, that Plaintiff specify the dollar amount of the damages sought. Plaintiff served his answers to interrogatories on August 17, 1990, claiming, for the first time, in excess of $800,000 in damages. Powermatic filed its Notice of Removal on August 27, 1990 (well within thirty days after August 17, 1990) in reliance on the provisions of 28 U.S.C. § 1446(b). The United States District Court for the Northern District of Texas denied Plaintiff's Motion to Remand and found that the case was timely removed because Powermatic removed the case within thirty days after receiving the answers to interrogatories stating that the amount in controversy was over $50,000. The district court specifically found that the interrogatories, for the first time, stated that the amount in controversy was over $50,000. The case proceeded to trial on the merits and the jury found in favor of Powermatic. There is no suggestion that Plaintiff did not receive a full and fair trial on the merits. Plaintiff appealed to the Court of Appeals for the

Fifth Circuit on the sole procedural issue of whether Powermatic timely filed its Notice of Removal.

REASONS FOR DENYING THE WRIT

I. THE PETITION FOR WRIT OF CERTIORARI IS UNTIMELY

The Court of Appeals for the Fifth Circuit entered its judgment on August 26, 1992. Petitioner filed a Suggestion for Rehearing In Banc under Rule 35 of the Federal Rules of Appellate Procedure. Petitioner did not file a petition for rehearing under Rule 40 of the Federal Rules of Appellate Procedure. Under 28 U.S.C. § 2101(c) a petition for writ of certiorari must be filed within ninety days after the entry of the judgment of the court of appeals. Rule 13.4 extends the time for filing **if a petition for rehearing is timely filed** in the court of appeals. Sup. Ct. R. 13.4. A suggestion for rehearing in banc under Rule 35(b) is not a petition for rehearing. *Missouri v. Jenkins*, 495 U.S. 33, 46 (1980). Although the order on the suggestion for rehearing states that the Fifth Circuit is treating the suggestion for rehearing as a petition for panel rehearing, Petitioner did not **file** a petition for rehearing to extend the time for filing a petition for writ of certiorari as is expressly required by Rule 13.4. Sup. Ct. R. 13.4. Thus, the present Petition for Writ of Certiorari filed on December 14, 1992, 110 days after the August 26, 1992 judgment, is untimely. Therefore, this Court lacks jurisdiction under 28 U.S.C. § 2101(c).

II. THE DISTRICT COURT HAD DIVERSITY JURISDICTION AND THE PLAINTIFF RECEIVED A FULL AND FAIR TRIAL ON THE MERITS

The Plaintiff received a full and fair trial on the merits in the United States District Court for the Northern District of Texas. There is no question that the district court had diversity jurisdiction in this case. Plaintiff complains solely of the procedural issue involving the district court's finding that Powermatic timely removed the case to federal court. Plaintiff is not complaining of any other error in the trial court; he is merely seeking a second bite at the apple in state court.

This case presents none of the special and important reasons for granting a writ of certiorari. Sup. Ct. R. 10. The Fifth Circuit's opinion below is not contrary to any decision of this Court or any court of appeals. The thirty-day time limit for removal under 28 U.S.C. § 1446(b) is a procedural requirement which is not jurisdictional. *Leininger v. Leininger,* 705 F.2d 727, 729 (5th Cir. 1983); *Financial Timing Publications, Inc. v. Compugraphics Corp.,* 893 F.2d 936, 940 (8th Cir. 1990). Once the district court has made the determination that the removal was timely, and given the parties a full and complete trial on the merits, then only in the rarest of cases should the appellate court undo all of this by remanding the case. It would be an unnecessary hardship to subject a party who prevailed in the district court to a reversal of the judgment, not because of an error in the trial, but because of a disputed question of removal. *See Mission Pacific Co. v. Fitzgerald,* 160 U.S. 556, 583 (1896). Even assuming there is some question as to the interpretation of the removal

statute, this is a matter that should be left to the discretion of the district courts. Thus, there are no special and important reasons for granting the writ of certiorari.

III. THE ISSUES PRESENTED IN THIS CASE ARE PROPERLY LEFT TO THE DISCRETION OF THE DISTRICT COURTS

Where, as here, the procedure or requirement does not affect the court's "power" (jurisdiction) to hear the case, the court's decision to exercise removal jurisdiction is reviewed under the abuse of discretion standard. *Pope v. MCI Telecommunications Corp.*, at 937 F.2d 258, 262 (5th Cir. 1991), *cert. denied*, ___ U.S. ___ (1992); *Financial Timing Publications, Inc. v. Compugraphics Corp.*, 893 F.2d 936, 940 (8th Cir. 1990). Each party had the opportunity to, and did, present factual and legal arguments to the district court as to the timeliness of the removal in this case. The district court **found** that Powermatic removed the case within thirty days after it first became removable – "30 days from the time it received answers to interrogatories stating that the amount in controversy was over $50,000." *Chapman v. Powermatic*, 969 F.2d 160, 161 (5th Cir. 1992) (quoting the district court's order). The court also **found** that the "case was timely removed pursuant to 28 U.S.C. § 1446(b)." *Id.* The district court's findings and its reliance on the express language of the statute afforded a reasonable basis for its decision, and no abuse of discretion occurred. The district court assumed jurisdiction over the case and proceeded to a full trial on the merits; no policy would be served by this Court remanding the case.

IV. THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY INTERPRETED 28 U.S.C. § 1446(b)

A. The Case Stated by Plaintiff's Original Petition Was Not Removable.

Section 1446(b) provides that "[i]f the **case stated by the initial pleadings** is not removable, a notice of removal may be filed within thirty (30) days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable. . . . " 28 U.S.C. § 1446(b). Plaintiff's Original Petition did not request a specific amount of damages, but rather stated that Plaintiff had "suffered damages in excess of the minimum jurisdictional limits of this Court." The minimum jurisdictional limit of the district court of Dallas County, Texas, $500, is obviously less than the $50,000 minimum jurisdictional amount in controversy necessary for diversity. Thus, the "case stated by the initial pleading" was not removable.

The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed in good faith. *Horton v. Liberty Mutual Ins. Co.*, 367 U.S. 348, 353, *reh'g denied*, 368 U.S. 870 (1961). This is entirely consistent with § 1446(b) which mandates that removability be determined **by the initial pleading.** The court should not affix jurisdiction by "prophesying" what the parties might plead. 367 U.S. at 356. "The cause of action is the

subject matter of the controversy, and that is, for all purposes of this suit, whatever the Plaintiff declares it to be in his pleadings." *Powers v. Chesapeake and Ohio Railroad Co.*, 169 U.S. 92, 97 (1898). The *Powers* case, decided almost 100 years ago, sets forth the longstanding rule that it is the record of the Court which determines removability. *Powers*, 169 U.S. at 101. So long as there does not appear of record to be any removable controversy, the defendant is not required to remove the case. *Powers*, 169, U.S. at 100. Once the jurisdictional facts appear of record, the case becomes removable. *Powers*, 169 U.S. at 102. Since the "case stated" in the Original Petition in this case did not exceed $50,000, Powermatic's Notice of Removal was not appropriate until it received an "other paper" stating the amount in controversy.

B. Plaintiff's Interrogatory Answers Were An "Other Paper" Within the Meaning of § 1446(b).

Section 1446(b) states that the defendant has thirty days to remove after receipt of a copy of "an amended pleading, motion, order, or other paper. . . . " 28 U.S.C. § 1446(b). Plaintiff cannot contend that the letters or other correspondence to Powermatic before the suit was filed constituted "an amended pleading, motion, [or] order." Further, such letters and correspondence would not constitute an "other paper" within the meaning of the statute. The Fifth Circuit correctly held that the plain language of the statute refers to papers received after the initial pleading. *Chapman v. Powermatic, Inc.*, 969 F.2d 160, 164 (5th Cir. 1992). Both the Fifth Circuit and the district court found that the interrogatory answer alleging

$800,000 in damages triggered the thirty-day time period for removal and that Powermatic timely filed its Notice of Removal.

V. MISSTATEMENTS IN THE PETITION FOR WRIT OF CERTIORARI

The Fifth Circuit opinion does not require a plaintiff to plead the federal jurisdictional amount. The Fifth Circuit and the district court merely found that Plaintiff's pleadings, which claimed no specific amount of damages, did not state a case which was removable. If a Plaintiff wishes to trigger the time period for removal, he can amend his pleadings or serve another paper after a suit is filed. The defendant can determine removability by serving interrogatories.

The Fifth Circuit opinion is not contrary to Texas law. Tex. R. Civ. P. 47(b) does not prohibit pleading a specific dollar amount. Petitioner has cited no authority for this proposition; none exists. Rule 47 merely sets forth the minimum requirements for pleading. Cases interpreting this rule hold that a plaintiff is not required to plead a specific dollar amount, not that he is prohibited from doing so. *Young v. Kirsch,* 814 S.W.2d 77 (Tex. App. – San Antonio 1991, no writ). Nothing in the rule prohibits pleading a specific dollar amount.

The Fifth Circuit opinion is not contrary to the policy of restricting removal jurisdiction. The decision does not seek to expand diversity jurisdiction. To the contrary, the court sends a strong message to defendants in the habit of making "knee-jerk" removals. Plaintiff's proposed rule would allow lawsuits with no apparent foundation for

the exercise of federal jurisdiction to be prematurely removed. Plaintiff seeks to penalize Powermatic for seeking to ascertain through interrogatories the amount of Plaintiff's damages instead of instantly removing the case. Instead of immediately removing the case, Powermatic established the amount in controversy and then promptly removed the case. Powermatic should not be penalized for following the **express language** of the statute.

Petitioner argues that this Court must announce a new "bright line" rule, and then urges a rule which contains no bright line and which is inconsistent with the statute. The Fifth Circuit chose to track the language of § 1446(b), and to determine removability from the face of the pleadings. *Chapman v. Powermatic, Inc.*, 969 F.2d 160, 163 (5th Cir. 1992). Petitioner, on the other hand, would require a subjective inquiry into the state of mind of the removing defendant, based upon evidence outside the record.

CONCLUSION

For the foregoing reasons, Respondent prays that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

MARK A. SHANK
WILLIAM L. DAVIS
Counsel of Record
CLARK, WEST, KELLER,
BUTLER & ELLIS
4800 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270-2146
Telephone: (214) 741-1001
Facsimile: (214) 760-9812

Counsel for Respondent